

IN THE UNITED STATES DISTRICT COURT FOR THE
SOUTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

CHARLES CAVER :
Petitioner, :
v. : CIVIL ACTION NO. 03-00661-BH-B
GWENDOLYN MOSLEY, :
Respondent. :

REPORT AND RECOMMENDATION

Charles Caver, a state prisoner currently in the custody of respondent, has petitioned this Court for federal habeas corpus relief pursuant to 28 U.S.C. § 2254. Petitioner challenges the validity of his August 18, 1999, conviction by a jury in the Circuit Court of Mobile County, Alabama, for first degree robbery, for which he received a sentence of life imprisonment in the state penitentiary pursuant to the Habitual Felony Offender Act. (Doc. 11, Ex. M at 3-4).

This matter is now before the undersigned Magistrate Judge on Petitioner's petition, respondent's answer, briefs, responses, and exhibits filed by the parties, various state court briefs filed by the parties, and opinions and orders of the state appellate courts. Following a careful review of the records and exhibits, the undersigned finds that there are

sufficient facts and information upon which the issues under consideration may be properly resolved. Therefore, no evidentiary hearing is required upon the issues. See Keeney v. Tamayo-Reyes, 504 U.S. 1, 12 (1992).

BACKGROUND FACTS

The Alabama Court of Criminal Appeals found the facts of this case to be as follows:¹

On September 29, 1998, Tracy Johnson was robbed at gunpoint by appellants Charles Henry Caver, Jr. and Kenneth Morrissette in the Snug Harbor neighborhood of Prichard, Alabama. Johnson lived in the neighborhood his entire life and had known the appellants since childhood. Around 4:00 p.m. on that afternoon, the appellants and seven or eight others came to the neighborhood to play football. The group of young men talked about playing football for approximately five minutes and then decided not to play. At this point the appellants decided to leave the area.

Approximately forty-five minutes later Johnson was standing on the front porch of a friend's house, when he saw the appellants drive up in a burgundy Chevrolet and park twenty feet away. Caver was driving the car and Morrissette was riding in the front passenger's seat. Caver and Morrissette got out of the car, walked up to Johnson, and asked him what did he have

¹ The Antiterrorism and Effective Death Penalty Act (AEDPA) directs that a presumption of correctness be afforded factual findings of state courts, "which may be rebutted only by clear and convincing evidence." Bui v. Haley, 321 F.3d 1304, 1312 (11th Cir. 2003) (citing 28 U.S.C. § 2254(e)(1) and Sumner v. Mata, 449 U.S. 539, 547 (1981)).

in his pockets. When Johnson replied that it was none of their business, both Caver and Morrissette pulled out .38 caliber revolvers. Morrissette stuck his gun in Johnson's side and Caver stood a short distance away and pointed his gun at Johnson. Then, Morrissette reached in Johnson's pants pockets and took \$60.00.

After Morrissette took the money, he and Caver got back into the car and drove approximately fifteen feet. Caver, who was driving the car, stopped when Morrissette looked back and noticed that Johnson had a smile on his face. Morrissette stated that they were going to get Johnson for "messing" with them. Then, Caver backed the car up to where Johnson was standing and both he and Morrissette got out of the car again with their guns drawn. At this point, Caver told Johnson that "it was no problem with killing him." Johnson testified that when Caver and Morrissette came back he was not smiling and that he was frightened. After threatening Johnson, Caver and Morrissette got back in the car and drove off.

Johnson immediately ran home and called the police. A police officer came to Johnson's home and took an incident report. After the police officer left, Johnson left his home to go pick up his daughter and came in contact with Caver and Morrissette. As Johnson was taking a short cut through an alley when [sic] he saw Caver and Morrissette. On this occasion, Caver and Morrissette were sitting in a white Chevrolet Impala and there were two other men in the car with them. When Johnson made eye contact with the appellants he pulled out his gun, which he had obtained from his home before leaving, and got into a shoot out with them. During the gunfire exchange no one was hit or injured and when the shooting stopped

Johnson returned home.

Caver and Morrissette were subsequently apprehended when a police officer noticed Caver's vehicle stopped at a red light near the police station. An inventory search of the car revealed no weapons, but, .38 caliber bullets were found in the ashtray of the car. Consequently, both Caver and Morrissette were arrested and charged with robbery in the first degree.

(Doc. 11, Ex. D at 1-2).

Petitioner was indicted by the Mobile County Grand Jury on January 22, 1999, and charged with first degree robbery. He entered a plea of not guilty to the charge. (Id., Ex. M at 1-2). Following a jury trial in the Circuit Court of Mobile County, Alabama, Petitioner was convicted on August 18, 1999, of first degree robbery and sentenced as a habitual felony offender to life imprisonment.² (Id. at 3-4). Petitioner was represented at trial by attorney D.E. "Skip" Brutkiewicz, Jr., and, at sentencing, by Jerome Carter, Esq. (Id. at 3).

On September 16, 1999, the trial court appointed Desmond Toler, Esq., to represent Petitioner on appeal. (Id. at 4). Petitioner appealed his conviction to the Alabama Court of

² The Case Action Summary entry for September 16, 1999, reflects that Petitioner was sentenced to life imprisonment without the possibility of parole. (Doc. 11, Ex. M at 4). However, on February 8, 2000, the court corrected the entry to reflect that Petitioner had actually been sentenced to life imprisonment. (Id.).

Criminal Appeals, and the court affirmed the conviction by memorandum opinion on March 24, 2000. (Doc. 11, Ex. M at 5; Doc. 11, Ex. D). Petitioner then filed a petition for a writ of certiorari to the Alabama Supreme Court, which that court denied without opinion on September 8, 2000. (Doc. 1 at 4; Doc. 11 at 8; Doc. 11, Ex. G).

On January 8, 2001, Petitioner filed a petition for habeas relief in this Court challenging his August 18, 1999 conviction for first degree burglary. (Doc. 11, Ex. K at 1-2). On October 12, 2001, the Court denied the habeas petition and dismissed it, without prejudice, finding that Petitioner's claims were unexhausted. (Doc. 11, Ex. K; Doc. 11, Ex. L).

On July 26, 2001, Petitioner filed a petition, *pro se*, in the state circuit court for post-conviction relief pursuant to Rule 32 of the Alabama Rules of Criminal Procedure. (Doc. 11, Ex. M at 11). On March 12, 2002, the circuit court denied Petitioner's Rule 32 petition, and Petitioner appealed to the Alabama Court of Criminal Appeals. (Id. at 123, 126). On November 15, 2002, the Alabama Court of Criminal Appeals affirmed the judgment of the trial court, by memorandum opinion, denying Petitioner's Rule 32 petition for post-conviction relief. (Doc. 11, Ex. P). Petitioner applied for a rehearing, which the Alabama Court of Criminal Appeals

overruled on January 7, 2003. (Doc. 11, Ex. R). Petitioner then filed a petition for a writ of certiorari with the Alabama Supreme Court, which that court denied without opinion on August 15, 2003. (Doc. 11, Ex. S).

On October 2, 2003, Petitioner filed the instant petition for a writ of habeas corpus, setting forth seventeen claims in support of his request for habeas relief: (1) ineffective assistance of trial counsel for failing to request a curative instruction after the prosecutor told the jury to "trust me," and ineffective assistance of appellate counsel for failing to raise trial counsel's ineffectiveness on appeal; (2) ineffective assistance of trial counsel for failing to request that the court instruct the jury on Petitioner's theory of the case, and ineffective assistance of appellate counsel for failing to raise trial counsel's ineffectiveness on appeal; (3) ineffective assistance of trial counsel for failing to request that the petit jury be sworn in before trial, and ineffective assistance of appellate counsel for failing to raise trial counsel's ineffectiveness on appeal; (4) ineffective assistance of trial counsel for failing to request a mistrial for the State's failure to produce exculpatory evidence, and ineffective assistance of appellate counsel for failing to raise trial counsel's ineffectiveness on appeal;

(5) ineffective assistance of trial counsel for failing to investigate Officer James Stallworth, and ineffective assistance of appellate counsel for failing to raise trial counsel's ineffectiveness on appeal; (6) ineffective assistance of trial counsel for failing to move to exclude Petitioner's statement under Alabama Rule of Evidence 404, and ineffective assistance of appellate counsel for failing to raise trial counsel's ineffectiveness on appeal;

(7) ineffective assistance of trial counsel for failing to move to exclude Petitioner's statement given in a previous homicide investigation, and ineffective assistance of appellate counsel for failing to raise trial counsel's ineffectiveness on appeal; (8) ineffective assistance of appellate counsel for failing to raise on appeal the insufficiency of the evidence;

(9) ineffective assistance of trial counsel for failing to request that the jury be instructed on the lesser included offense of third degree robbery, and ineffective assistance of appellate counsel for failing to raise trial counsel's ineffectiveness on appeal; (10) ineffective assistance of trial counsel for failing to move for a mistrial when the court commented on the evidence, and ineffective assistance of appellate counsel for failing to raise trial counsel's ineffectiveness on appeal; (11) ineffective assistance of

trial counsel for failing to file a motion to impeach witnesses pursuant to Alabama Rules of Evidence 609 and 616, and ineffective assistance of appellate counsel for failing to raise trial counsel's ineffectiveness on appeal; (12) ineffective assistance of trial counsel for failing to file a motion to admit evidence of other crimes by a witness under Alabama Rule of Evidence 404(b), and ineffective assistance of appellate counsel for failing to raise trial counsel's ineffectiveness on appeal; (13) ineffective assistance of trial counsel for failing to file a motion for additional jurors from which to strike the jury, and ineffective assistance of appellate counsel for failing to raise trial counsel's ineffectiveness on appeal; (14) ineffective assistance of trial counsel for failing to request certain jury charges, and ineffective assistance of appellate counsel for failing to raise trial counsel's ineffectiveness on appeal; (15) ineffective assistance of trial counsel for failing to conduct a proper investigation, and ineffective assistance of appellate counsel for failing to raise trial counsel's ineffectiveness on appeal; (16) the court was without jurisdiction to render judgment or impose sentence; and (17) Petitioner's due process rights were violated by the court's failure to conduct a sentencing hearing. (Doc. 1).

The Court will consider each of these claims in turn.

DISCUSSION

As outlined above, Petitioner has filed a petition for a writ of habeas corpus under 28 U.S.C. § 2254, raising seventeen federal constitutional claims. For the reasons set forth below, the Court finds that Petitioner is not entitled to habeas relief.

I. Claim 1.

Petitioner argues first in his petition that he is entitled to relief under § 2254 on the ground that his trial counsel was ineffective for failing to request a curative instruction after the prosecutor told the jury in closing argument to "trust me" and that his appellate counsel was ineffective for failing to raise trial counsel's ineffectiveness on appeal. (Doc. 1, attachment at 11). Respondent argues that this claim is procedurally defaulted. The Court agrees.

Section 2254(b)(1) provides that a prisoner in state custody shall not be granted a writ of habeas corpus unless the prisoner "has exhausted the remedies available in the courts of the State." "In other words, the state prisoner must give the state courts an opportunity to act on his claims before he presents those claims to a federal court in a habeas

petition." O'Sullivan v. Boerckel, 526 U.S. 838, 842 (1999).

A state prisoner's failure to present his claims to the state courts in the proper manner results in a procedural default of those claims. Id., 526 U.S. at 848.

In addressing the proper manner in which a federal claim must be presented to the state court to prevent procedural default, the United States Supreme Court has stated:

In Picard v. Connor, 404 U.S. 270, 275, 92 S. Ct. 509, 512, 30 L. Ed. 2d 438 (1971), we said that exhaustion of state remedies requires that Petitioners "fairly presen[t]" federal claims to the state courts in order to give the State the "'opportunity to pass upon and correct' alleged violations of its prisoners' federal rights" (some internal quotation marks omitted). If state courts are to be given the opportunity to correct alleged violations of prisoners' federal rights, they must surely be alerted to the fact that the prisoners are asserting claims under the United States Constitution. If a habeas Petitioner wishes to claim that an evidentiary ruling at a state court trial denied him the due process of law guaranteed by the Fourteenth Amendment, he must say so, not only in federal court, but in state court.

Duncan v. Henry, 513 U.S. 364, 365-66 (1995). The exhaustion doctrine also requires that a Petitioner "give the state courts one full opportunity to resolve any constitutional issues by invoking one complete round of the State's established appellate review process." O'Sullivan, 526 U.S.

at 845. In Alabama, the established appellate review process includes an appeal to the Alabama Court of Criminal Appeals, an application for rehearing to the Alabama Court of Criminal Appeals, and an application for discretionary review by the Alabama Supreme Court. See Ala. R. App. P. 4, 39, 40. The threshold question here is whether Petitioner fully and fairly presented habeas claim 1 to the Alabama courts by invoking one complete round of the State's established appellate review process.

The record shows that, while Petitioner filed a direct appeal of his conviction in the state court, he failed to raise this issue in his direct appeal proceedings. (Doc. 11, Ex. B at 5). Petitioner then filed a petition for post-conviction relief pursuant to Rule 32 of the Alabama Rules of Criminal Procedure; however, he failed to raise habeas claim 1 at any time during those proceedings, as well. (Doc. 11, Ex. M at 11, 123).

Alabama courts generally require that a criminal defendant assert claims for ineffective assistance of counsel in a motion for a new trial in order to properly preserve the claim for review on direct appeal. Ex parte E.D., 777 So. 2d 113, 115 (Ala. 2000) (citing Ex parte Ingram, 675 So. 2d 863, 865-66 (Ala. 1996)). However, when a criminal defendant

cannot reasonably make such a claim within the 30 days allowed by Alabama Rule of Criminal Procedure 24.1(b), the proper method for presenting the claim is to raise it in a Rule 32 petition. Id. Assuming that Petitioner could not reasonably assert habeas claim 1 in his direct appeal proceedings, particularly as it relates to his appellate counsel, he was required to do so in his Rule 32 petition. He did not raise this claim, however, despite the fact that he raised many other claims of ineffective assistance of counsel in his Rule 32 proceedings. Thus, habeas claim 1 is unexhausted, and any attempt by Petitioner to raise it now in the state court would be futile. See Ala. R. Crim. Proc. 32.2(b) (barring a second or successive petition on any ground that was known at the time that the first petition was heard).

Where, as here, the Petitioner has failed to exhaust state remedies that are no longer available, that failure is a procedural default which will bar federal habeas relief unless either the cause and prejudice or the fundamental miscarriage of justice exception is established. Smith v. Jones, 256 F.3d 1135, 1138 (11th Cir. 2001) (citing O'Sullivan, 526 U.S. at 848-49 and Coleman v. Thompson, 501 U.S. 722, 750 (1991)). See also Gates v. Zant, 863 F.2d 1492, 1500 (11th Cir. 1989) ("[a] defendant who is procedurally barred from raising a

federal constitutional claim in state court is also barred from raising the claim in a federal habeas petition unless he can show cause for and actual prejudice from making the default."); Medina v. Singletary, 59 F.3d 1095, 1107 (11th Cir. 1995) ("[i]f a state prisoner fails to raise a claim in state court, or attempts to raise a claim in an improper manner, and state procedural rules preclude the state courts from hearing the merits of the claim, then the federal habeas court is also precluded from hearing its merits, absent a showing of cause and prejudice.").

"Cause" for a procedural default exists if "the prisoner can show that some objective factor external to the defense impeded counsel's efforts to comply with the State's procedural rule," or that the procedural default was the result of ineffective assistance of counsel. Murray v. Carrier, 477 U.S. 478, 488 (1986). To establish "prejudice," the Petitioner additionally must show "not merely that the errors at his trial created a *possibility* of prejudice, but that they worked to his *actual* and substantial disadvantage, infecting his entire trial with error of constitutional dimensions." United States v. Frady, 456 U.S. 152, 170 (1982) (emphasis in original). In the absence of a showing of cause and prejudice, the Court may yet consider a procedurally

defaulted claim if a "fundamental miscarriage of justice" has "probably resulted in the conviction of one who is actually innocent." Smith v. Murray, 477 U.S. 527, 537-38 (1986).

Although Petitioner has been afforded the opportunity to demonstrate cause and prejudice for his default with regard to this habeas claim, he has failed to demonstrate, or even allege, that "some objective factor external to the defense impeded counsel's efforts to comply with the State's procedural rule," or that the cause for the procedural default was the result of ineffective assistance of counsel. Murray, 477 U.S. at 488. Moreover, Petitioner has failed to show that he is "actually innocent," thereby establishing that a fundamental miscarriage of justice would occur if this Court did not consider these claims. Id. at 496. Therefore, the Court finds that Petitioner has failed to establish cause and prejudice as those terms are defined by law, and he has failed to establish that a denial of review constitutes a fundamental miscarriage of justice. Accordingly, Petitioner's habeas claim 1 is procedurally barred in this Court and is due to be dismissed.

II. Claims 2-17.

Petitioner's habeas claims 2-15 involve claims for relief under § 2254 on various grounds of ineffective assistance of

trial and appellate counsel. Petitioner's habeas claims 16 and 17 involve claims for relief under § 2254 based on actions of the trial court related to Petitioner's sentencing. The record shows that, with two exceptions, Petitioner presented these claims to the state courts in his Rule 32 proceedings, and the state courts denied the claims on the merits.³ (Doc. 11, Exs. N, P). Therefore, the claims are exhausted and are not procedurally defaulted.

28 U.S.C. § 2254(d) provides that:

(d) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim-

- (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
- (2) resulted in a decision that

³ The record shows that Petitioner did not exhaust a portion of habeas claim 5 related to ineffective assistance of appellate counsel. As discussed below, the Court has considered this unexhausted portion of habeas claim 5, *de novo*, as provided in 28 U.S.C. § 2254(b)(2). In addition, although Petitioner did present habeas claim 12 to the state courts in his Rule 32 proceedings, the Alabama Court of Criminal Appeals did not adjudicate the claim when it denied his petition for relief. Therefore, as discussed below, the Court has considered this claim, *de novo*, as well.

was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

Id. Petitioner filed his habeas petition after the enactment of the AEDPA; therefore, subsection (d) applies to his petition.

In Williams v. Taylor, 529 U.S. 362, 412 (2000), Justice O'Connor, writing for a majority of the Court, recognized that § 2254(d)(1) places a new constraint on the power of a federal habeas court to grant a state prisoner's application for a writ of habeas corpus with respect to claims adjudicated on the merits, as a writ may issue only if the state court adjudication resulted in a decision that (1) "was contrary to . . . clearly established Federal law, as determined by the Supreme Court of the United States," or (2) "involved an unreasonable application of . . . clearly established Federal law, as determined by the Supreme Court of the United States."

A state court decision is contrary to the Supreme Court's clearly established precedent (1) if the state court applies a rule that contradicts the governing law as set forth in Supreme Court case law, or (2) if the state court confronts a set of facts that are materially indistinguishable from those in a decision of the Supreme Court and nevertheless arrives at a result different from Supreme Court precedent.

See Williams v. Taylor, 529 U.S. 362, 120 S. Ct. 1495, 1519-20, 146 L. Ed. 2d 389 (2000).

A state court decision involves an unreasonable application of Supreme Court precedent "if the state court identifies the correct governing legal rule from [Supreme Court] cases but unreasonably applies it to the facts of the particular state prisoner's case." Williams, 120 S. Ct. at 1520. In addition, a state court decision involves an unreasonable application of Supreme Court precedent "if the state court either unreasonably extends a legal principle from [Supreme Court] precedent to a new context where it should not apply or unreasonably refuses to extend that principle to a new context where it should apply." Id.

Bottoson v. Moore, 234 F.3d 526, 531 (11th Cir. 2000).

Moreover, the Act, as amended, presumes as correct all determinations of factual issues made by a state court and places the burden upon the Petitioner of rebutting such a presumption of correctness by clear and convincing evidence. 28 U.S.C. § 2254(e).

In addition, to prevail on any of his claims of ineffective assistance of counsel, Petitioner bears the burden of establishing by a preponderance of the evidence that his trial and/or appellate counsel's performance was deficient and that he was actually prejudiced by the inadequate performance. Strickland v. Washington, 466 U.S. 668 (1984). The elements to be considered are as follows:

First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable.

Id., 466 U.S. at 687. Thus, Petitioner must demonstrate that his counsel's performance "fell below an objective standard of reasonableness," Strickland, 466 U.S. at 688, and that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Id. at 694. "Establishing these two elements is not easy: 'the cases in which habeas Petitioners can properly prevail on the ground of ineffective assistance of counsel are few and far between.'" Van Poyck v. Florida Dep't of Corrections, 290 F.3d 1318, 1322 (11th Cir. 2002) (quoting Waters v. Thomas, 46 F.3d 1506, 1511 (11th Cir. 1995)).

An ineffective assistance of counsel claim is examined under the "totality of the circumstances." House v. Balkcom, 725 F.2d 608, 615 (11th Cir. 1984). An attorney's performance is presumed to have been reasonable and must not be examined with the aid of judicial hindsight. Messer v. Kemp, 760 F.2d

1080, 1088 (11th Cir. 1985). A federal court must apply a "heavy measure of deference to counsel's judgments."

Singleton v. Thigpen, 847 F.2d 668, 670 (11th Cir. 1988) (quoting Strickland, 446 U.S. at 691).

The test has nothing to do with what the best lawyers would have done. Nor is the test even what most good lawyers would have done. We ask only whether some reasonable lawyer at the trial could have acted, in the circumstances, as defense counsel acted at trial. . . . We are not interested in grading lawyers' performances; we are interested in whether the adversarial process at trial, in fact, worked adequately.

Grayson v. Thompson, 257 F.3d 1194, 1216 (11th Cir. 2001) (quoting White v. Singletary, 972 F.2d 1218, 1220-21 (11th Cir. 1992)).

With respect to habeas claim 2, Petitioner claims that his trial counsel was ineffective for failing to request that the court instruct the jury on Petitioner's theory of the case and that his appellate counsel was ineffective for failing to raise trial counsel's ineffectiveness on appeal. Petitioner presented this same argument to the Alabama Court of Criminal Appeals in his Rule 32 proceedings, and, in its memorandum opinion denying Petitioner's request for Rule 32 relief on this claim, the court stated:

Next, Caver argued that his appellate counsel was ineffective for failing to

raise a claim of ineffective assistance of trial counsel based on trial counsel's failure to request a jury instruction "on his client's theory of the case." The trial court found Caver's theory, that he was the actual victim in this robbery, to be implausible and without any evidentiary support. Our review of the record of Caver's direct appeal confirms the trial court's decision. Caver was not entitled to jury instructions on these grounds. Therefore, trial counsel was not ineffective for failing to object to the trial court's failure to give such instructions. Because trial counsel's conduct was not deficient in this regard, there was no basis for appellate counsel to question the competence of trial counsel's decision.

(Doc. 11, Ex. P at 6-7).

Having reviewed the record in this matter, the Court agrees with the Alabama Court of Criminal Appeals that Petitioner's trial counsel was not deficient for failing to request that the court instruct the jury on Petitioner's theory of the case, nor was his appellate counsel deficient for failing to raise trial counsel's ineffectiveness on appeal. The record shows that the jury was aware of Petitioner's defense that he was the true victim in the case, as Petitioner testified at trial that he did not rob Johnson, but, rather, Johnson appeared from no where and began firing a gun into his car. (Doc. 11, Ex. A, Reporter's Transcript, Vol. 2, at R-105-R-106, R-111). Assuming, *arguendo*, that

trial counsel erred in failing to request a specific jury charge on Petitioner's defense theory, Petitioner has failed to show that counsel's error was "so serious as to deprive the defendant of a fair trial, a trial whose result is reliable" and that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Strickland, 466 U.S. at 687, 694. Therefore, Petitioner has failed to establish ineffective assistance of trial or appellate counsel with respect to habeas claim 2.

With respect to habeas claim 3, Petitioner claims that his trial counsel was ineffective for failing to request that the petit jury be sworn in before trial and that his appellate counsel was ineffective for failing to raise trial counsel's ineffectiveness on appeal. Petitioner presented this same argument to the Alabama Court of Criminal Appeals in his Rule 32 proceedings, and, in its memorandum opinion denying Petitioner's request for Rule 32 relief on this claim, the court stated:

Next, Caver argues that appellate counsel was ineffective for failure to raise a claim of ineffective assistance of trial counsel based on his failure to object to the circuit court's failure to swear in the petit jury, pursuant to § 12-16-170, Ala. Code 1975. Caver requests that his case be remanded to determine

whether the petit jury was properly sworn.

The circuit court found no factual basis for this claim, noting:

"It has always been the custom, habit and practice of this court to swear in the jury venire and the petit jury. Moreover, when jurors are assembled they are always administered an oath to answer questions touching their qualifications truthfully and to render true verdicts according to the law and evidence." (C. 124).

We have recently examined this issue in Brooks v. State, [Ms. CR-00-1892, March 1, 2002] ___ So. 2d ___ (Ala. Crim. App. 2002), and direct Caver's attention to our rationale in rejecting a similar claim. Based on the personal knowledge of the trial judge contained in the record before us, this claim had no basis in fact. Therefore, neither trial counsel nor appellate counsel was ineffective for not raising this claim as a basis for relief.

(Doc. 11, Ex. P at 9-10).

Having reviewed the record in this matter, the Court agrees with the Alabama Court of Criminal Appeals that Petitioner's trial counsel was not deficient for failing to request that the petit jury be sworn in before trial, nor was his appellate counsel deficient for failing to raise trial counsel's ineffectiveness on appeal. Contrary to Petitioner's allegations, the record shows that the jury venire was sworn prior to jury selection in his case, and, after the jury was

selected, the petit jury was sworn. (Doc. 11, Ex. A, Vol. 2, Voir Dire Transcript at R-3; id., Trial Transcript at R-5). Therefore, Petitioner has failed to establish ineffective assistance of trial or appellate counsel with respect to habeas claim 3.

With respect to habeas claim 4, Petitioner claims that his trial counsel was ineffective for failing to request a mistrial for the State's failure to produce exculpatory evidence and that his appellate counsel was ineffective for failing to raise trial counsel's ineffectiveness on appeal. Petitioner presented this same argument to the Alabama Court of Criminal Appeals in his Rule 32 proceedings, and, in its memorandum opinion denying Petitioner's request for Rule 32 relief on this claim, the court stated:

Caver argues that appellate counsel should have raised an ineffective-assistance-of-trial counsel claim because counsel did not object to the prosecution's failure to provide defense counsel with a copy of the police investigative report. Caver claims that the report contained information about whether a white Chevrolet Impala had been "shot up." He argues trial counsel's conduct was deficient because he should have moved for a mistrial based on the State's discovery violation.

Rule 16.1(e), Ala. R. Crim. P., provides that, with limited exception, the discovery and inspection of reports, memoranda, witness lists, or other internal documents made by law enforcement agents,

in connection with the investigation and prosecution of a case are not discoverable. Caver does not claim that the report contained exculpatory information, nor has he shown how he was prejudiced by the State's failure to produce the report prior to trial. Furthermore, the circuit court noted that the information alleged to be contained in the reports was available at trial. Caver himself testified about the details of the shoot-out and effectively used information about the occurrence at trial. Because there was no basis for an ineffective-assistance-of-counsel claim based on these grounds, appellate counsel was not ineffective for failing to raise this claim on direct appeal. Accordingly, the circuit court correctly denied relief based on this claim.

(Doc. 11, Ex. P at 7).

Having reviewed the record in this matter, the Court agrees with the Alabama Court of Criminal Appeals that Petitioner's trial counsel was not deficient for failing to request a mistrial for the State's failure to produce exculpatory evidence, nor was his appellate counsel deficient for failing to raise trial counsel's ineffectiveness on appeal. Petitioner claims in his habeas petition that the State failed to produce statements made by witnesses "against the Petitioner's character," a statement by the victim, an incident report, a towing report showing the time of arrest, an inventory report showing which items were found in Petitioner's car, and live bullet rounds purportedly found in

his car.⁴ To the contrary, the record shows that, prior to trial, the State provided Petitioner with copies of an incident report, as well as an investigative report, multiple witness statements bearing on Petitioner's character, and multiple statements made by the victim. (Doc. 11, Ex. A, Vol. 1, C.R. 69-70, 94-134, 144, 150). Assuming, however, that evidence was withheld from Petitioner, Petitioner has failed to specify how the particular evidence was exculpatory in nature and, thus, warranted a motion for a mistrial. Therefore, Petitioner has failed to establish ineffective assistance of trial or appellate counsel with respect to habeas claim 4.

With respect to habeas claim 5, Petitioner claims that his trial counsel was ineffective for failing to investigate wrongdoing on the part of Officer James Stallworth and that his appellate counsel was ineffective for failing to raise trial counsel's ineffectiveness on appeal. Petitioner presented this same argument to the Alabama Court of Criminal Appeals in his Rule 32 proceedings with respect to his trial counsel,⁵ and, in its memorandum opinion denying Petitioner's

⁴Petitioner does not specify which witness and victim statements were allegedly withheld from him.

⁵Although it appears that Petitioner did not present this claim to the state court as it relates to Petitioner's

request for Rule 32 relief on this claim, the court stated:

Caver contends that his trial counsel was ineffective for failing to investigate alleged wrong-doing on the part of the investigating officer, Detective Stallworth. Caver alleged that he learned that the detective had a motive to arrest him and that Stallworth had lost a document relating to the incident - the statement of the victim. The circuit court rejected Caver's claim that his attorney had failed to investigate the alleged misconduct, finding that Caver was not entitled to relief on a generalized claim that lacked specificity. The court's finding is correct. Claims of failure to investigate must show with specificity what information would have been obtained with investigation, and whether, assuming the evidence is admissible, its admission would have produced a different result. Thomas v. State, 766 So. [2d] at 892 (citing Nelson v. Hargett, 989 F.2d [847], 850 (5th Cir. 1993); see also Patrick v. State, 680 So. 2d 959, 962 (Ala. Crim. App. 1996) (trial counsel is not required to investigate every "will-o'-the-wisp or rabbit trial (sic) matters of mitigation or defense").

(Doc. 11, Ex. P at 6).

Having reviewed the record in this matter, the Court

appellate counsel, under 28 U.S.C. § 2254(b)(2), "[a]n application for a writ of habeas corpus may be denied on the merits, notwithstanding the failure of the applicant to exhaust the remedies available in the courts of the State." See also Lafitte v. Johnson, 2000 WL 724159, *2 n.2 (S.D. Ala. May 17, 2000). Therefore, the Court has considered habeas claim 5, as it relates to Petitioner's appellate counsel, *de novo*.

agrees with the Alabama Court of Criminal Appeals that Petitioner's trial counsel was not deficient for failing to investigate Officer Stallworth, nor was his appellate counsel deficient for failing to raise trial counsel's ineffectiveness on appeal. In his habeas petition, Petitioner alleges that Officer James Stallworth committed perjury at trial by claiming to have lost documents pertaining to the investigation that would have proved Petitioner's innocence. Petitioner does not identify, however, the documents which he claims were lost, nor does he specify how those particular documents were exculpatory in nature. Moreover, contrary to Petitioner's claim, the record shows that Officer Stallworth never testified, falsely or otherwise, that any documents or evidence had been lost. Rather, when asked if he had a report indicating the condition of Petitioner's vehicle at the time of arrest, and he simply stated, "I don't have that report with me."⁶ (Doc. 11, Ex. A, Vol. 2 at R-116). Therefore, Petitioner has failed to establish ineffective assistance of trial counsel for failing to investigate Officer Stallworth's alleged misconduct regarding lost documents, and he has failed

⁶Officer Jerry Bolton testified that an inventory report related to Petitioner's vehicle had been lost in the records department. (Doc. 11, Ex. A, Vol. 2 at R-57). Officer Stallworth did not testify about the whereabouts of any such report. (Id. at R-116).

to establish ineffective assistance of appellate counsel for failing to raise trial counsel's ineffectiveness on appeal.

With respect to habeas claim 6, Petitioner claims that his trial counsel was ineffective for failing to move to exclude a statement that he made to police as improper character evidence under Alabama Rule of Evidence 404 and that his appellate counsel was ineffective for failing to raise the issue of trial counsel's ineffectiveness on appeal.

Petitioner presented this same argument to the Alabama Court of Criminal Appeals in his Rule 32 proceedings, and, in its memorandum opinion denying Petitioner's request for Rule 32 relief on this claim, the court stated:

Caver contends that his appellate counsel was ineffective for his failure to argue that trial counsel was ineffective because, he said, trial counsel failed to move to exclude a statement made by Caver to police. Specifically, Caver claimed that the State's cross-examination regarding whether he owned a .38 revolver and whether he told police that he bought the gun "off the street" was improperly admitted. As best we can determine, Caver's claim is that he was unduly prejudiced by the testimony, as it constituted improper character evidence. The circuit court determined that the testimony was intended to impeach Caver, and was therefore not improper. Prior inconsistent statements may be used to impeach a witness. See Shumate v. State, 676 So. 1345, 1348 (Ala. Crim. App. 1995). Since the record does not support Caver's contention of error, neither trial counsel nor appellate counsel

were ineffective for failing to pursue this matter any further.

(Doc. 11, Ex. P at 8).

Having reviewed the record in this matter, the Court agrees with the Alabama Court of Criminal Appeals that Petitioner's trial counsel was not deficient for failing to move to exclude Petitioner's prior statement, nor was his appellate counsel deficient for failing to raise the issue of trial counsel's ineffectiveness on appeal. The record shows that Petitioner was asked on cross-examination whether he had told the police that he owned a .38 revolver that he had bought "off the street." (Doc. 11, Ex. A, Vol. 2 at R-109). Contrary to Petitioner's assertion, Petitioner's trial counsel twice objected to the question, and the trial court overruled the objections. (*Id.*). Therefore, Petitioner has failed to establish that his trial counsel was deficient for failing to move to exclude this evidence, and he has failed to establish ineffective assistance of appellate counsel for failing to raise trial counsel's ineffectiveness on appeal.

With respect to habeas claim 7, Petitioner claims that his trial counsel was ineffective for failing to move to exclude Petitioner's statement given in a previous homicide investigation involving the death of Kelsey McQueen ("the Kelsey McQueen statement") and that his appellate counsel was

ineffective for failing to raise trial counsel's ineffectiveness on appeal. Petitioner presented this same argument to the Alabama Court of Criminal Appeals in his Rule 32 proceedings, and, in its memorandum opinion denying Petitioner's request for Rule 32 relief on this claim, the court stated:

Caver contends that his appellate counsel erred by not raising a claim of ineffective assistance of trial counsel based on trial counsel's failure to move to suppress a statement given by Caver in a previous homicide investigation involving the death of Kelsey McQueen. He contends that the statement was in violation of the protections afforded by Miranda v. Arizona, [384 U.S. 436 (1966)], and was not admissible. Because our review of the record reveals that Caver was never questioned about such a statement, we find this claim to be without factual support. Thus, there was no basis for a claim of ineffective counsel based on these facts. Accordingly, the circuit court correctly determined that this claim was without merit.

(Doc. 11, Ex. P at 8).

Having reviewed the record in this matter, this Court likewise finds that Petitioner's trial counsel was not deficient for failing to move to exclude the Kelsey McQueen statement, nor was his appellate counsel deficient for failing to raise trial counsel's ineffectiveness on appeal. Although the Alabama Court of Criminal Appeals concluded that

Petitioner had never been questioned about the Kelsey McQueen statement at trial, the record shows that the Kelsey McQueen statement is actually the same statement referenced in habeas claim 6 and that Petitioner indeed was asked whether, in the statement, he had told the police that he owned a .38 revolver that he had bought "off the street." (Doc. 11, Ex. A, Vol. 1 at 87; Vol. 2 at R-109). This is the only reference to the statement in the trial court record, however, and, therefore, for the same reasons stated above in reference to habeas claim 6, the Court finds that Petitioner has failed to establish that his trial counsel was deficient for failing to move to exclude this statement, and Petitioner has failed to establish ineffective assistance of appellate counsel for failing to raise trial counsel's ineffectiveness on appeal.

With respect to habeas claim 8, Petitioner claims that his appellate counsel was ineffective for failing to raise on appeal the insufficiency of the evidence. Petitioner presented this same argument to the Alabama Court of Criminal Appeals in his Rule 32 proceedings, and, in its memorandum opinion denying Petitioner's request for Rule 32 relief on this claim, the court stated:

Caver contends that his appellate counsel was ineffective for his failure to raise on direct appeal whether the State presented sufficient evidence to sustain a

conviction for first-degree robbery. The circuit court, in its well-reasoned order, stated that even if this issue had been raised, Caver would not have prevailed or received any relief. The judge who presided over Caver's Rule 32 petition was the same judge who presided at trial and he based his ruling on his own personal knowledge of the evidence. See Makres v. State, 739 So. 2d 1141 (Ala. Crim. App. 1998). Given that the robbery victim had known Caver since childhood and positively identified him at trial as one of the men who robbed him at gunpoint, the court's finding was correct. Thus, we find no abuse of discretion that warrants relief.

(Doc. 11, Ex. P at 3-4).

Having reviewed the record in this matter, this Court likewise finds that Petitioner's appellate counsel was not deficient for failing to raise on appeal the insufficiency of the evidence. The record shows that the robbery victim, Tracy Johnson, testified at trial that he knew Petitioner and his accomplice, Kenneth Morrissette. (Doc. 11, Ex. A, Vol. 2 at R-23). He testified that they were "raised up in the same neighborhood" and that, just prior to the robbery, he had been talking to Petitioner, Morrissette, and several other people about playing football, but the game never materialized. (Id. at R-24-R-25). Johnson testified that, about forty-five minutes after the conversation about playing football, he was standing on the porch of a friend's house when Petitioner and Morrissette drove up and asked him what he had in his pockets.

(Id. at R-25-R-28). Johnson told them that it was none of their business, and they exited their car with guns drawn, walked up to Johnson, and physically removed sixty dollars from his pocket. (Id. at R-29). At trial, Johnson identified Petitioner and his accomplice, Kenneth Morrissette, in open court as the men who robbed him at gun point. (Id. at 23). Given this evidence, the Court agrees with the Alabama Court of Criminal Appeals that Petitioner's appellate counsel was not deficient for failing to raise on appeal the insufficiency of the evidence.

With respect to habeas claim 9, Petitioner claims that his trial counsel was ineffective for failing to request that the jury be instructed on the lesser included offense of third degree robbery and that his appellate counsel was ineffective for failing to raise this issue on appeal. Petitioner presented this same argument to the Alabama Court of Criminal Appeals in his Rule 32 proceedings, and, in its memorandum opinion denying Petitioner's request for Rule 32 relief on this claim, the court stated:

Caver contended that his appellate counsel was ineffective for failing to allege that trial counsel was ineffective for not asking the court to charge the jury on the "lesser included offense" of third-degree robbery.

"A person accused of the greater

offense is entitled to have the trial court charge on lesser offenses included within that offense when there is a reasonable theory from the evidence supporting the lesser offenses." Living v. State, [Ms. CR-98-1326, May 26, 2000] ___ So. 2d ___, ___ (Ala. Crim. App. 2000). See also § 13A-1-9(b), Ala. Code 1975, ("The court shall not charge the jury with respect to an included offense unless there is a rational basis for a verdict convicting the defendant of the included offense"). Caver argues that these proposed lesser offenses were supported by the evidence that he did not have a gun at the time of the commission of the offense; he further contends that the State did not sufficiently establish the elements of robbery in the first degree and that on that basis he was entitled to an instruction on robbery in the third degree.

The circuit court heard all of the evidence presented at trial and determined that there was no reasonable theory of the evidence that would rationally support a charge on third-degree robbery. Moreover, because Caver himself denied committing any offense, the court was left with either first-degree robbery or innocence. Counsel is not ineffective for failing to request a charge not supported by the evidence. Therefore, appellate counsel was not ineffective for alleging that trial counsel was ineffective in this regard. In proving ineffectiveness, the Petitioner has the burden of proof and "must overcome the presumption that, under the circumstances, the challenged action 'might be considered sound trial strategy.'" Strickland, 466 U.S. at 689; see also King v. State, 518 So. 2d 191, 195 (Ala. Crim. App. 1987); Dill v. State, 484 So. 2d 491 (Ala. Crim. App. 1985). A request for jury instructions is a matter of trial strategy and, absent a clear showing of improper or inadequate representation, is to be left to

the judgment of counsel. Haynes v. State, 461 So. 2d 869, 874 (Ala. Crim. App. 1984).

(Doc. 11, Ex. P at 4-5).

Having reviewed the record in this matter, this Court likewise finds that Petitioner's trial counsel was not deficient for failing to request that the jury be instructed on the lesser included offense of third degree robbery, nor was his appellate counsel ineffective for failing to raise trial counsel's ineffectiveness on appeal. Alabama Code § 13A-8-41 provides that a person commits the crime of first degree robbery if he violates Alabama Code § 13A-8-43 (third degree robbery), and he "is armed with a deadly weapon" or "causes serious physical injury to another." The victim, Tracy Johnson, testified at trial that Petitioner and his accomplice, Kenneth Morrisette, robbed him at gunpoint. (Doc. 11, Ex. A, Vol. 2 at R-28-R-32). Petitioner claims that, because no guns were found in the vehicle that he was driving at the time of his arrest, one could infer that no guns were used in the robbery, and, thus, the jury should have been charged on the lesser included offense of third degree robbery. The Court disagrees. The record shows that the victim, Johnson, testified that Petitioner was driving a burgundy Chevrolet at the time of the robbery. (Id. at R-27).

Officer Jerry Bolton testified that, later that evening when Petitioner was arrested, he was driving a white Impala. (Id. at R-52-R-54). The fact that no guns were found in the Impala that Petitioner was driving at the time of arrest does not support the inference that no guns were used in the robbery earlier that evening when Petitioner was driving a burgundy Chevrolet, nor does it support a jury charge on third degree robbery. Moreover, as noted by the appeals court, Petitioner denied committing any offense; thus, under the facts presented, the Court was left with innocent or first degree robbery. Accordingly, Petitioner has failed to establish ineffective assistance of trial counsel for failing to request that the jury be instructed on the lesser included offense of third degree robbery, and he has failed to establish ineffective assistance of appellate counsel for failing to raise trial counsel's ineffectiveness on appeal.

With respect to habeas claim 10, Petitioner claims that his trial counsel was ineffective for failing to move for a mistrial when the court commented on evidence concerning the content of a statement given to police by the victim, Tracy Johnson, and that his appellate counsel was ineffective for failing to raise trial counsel's ineffectiveness on appeal. Petitioner presented this same argument to the Alabama Court

of Criminal Appeals in his Rule 32 proceedings, and, in its memorandum opinion denying Petitioner's request for Rule 32 relief on this claim, the court stated:

Caver contends that appellate counsel was ineffective for failing to raise a claim of ineffective assistance of trial counsel based on trial counsel's failure to move for a mistrial and request curative instructions based on an improper comment referring to Caver as a "snitch." Specifically, the record shows that, during cross-examination of witness Tracy Johnson, defense counsel asked Johnson if he had told law enforcement authorities that Caver was a "snitch." The State objected to this line of questioning. After numerous questions were asked in an attempt to define and understand Johnson's use of the term, the circuit court reviewed a written statement and replied, "He didn't call anybody a snitch." Defense counsel objected to the court's comment, alleging that this remark constituted an improper comment on the evidence. Thus, defense counsel's objection was overruled and the State's objection was sustained.

Decisions on the admissibility of evidence are within the sound discretion of the trial court. If we followed Caver's argument to its logical conclusion, each proffer of evidence submitted to the trial court for a determination of admissibility would be improper, since the trial court would have to evaluate and comment on the evidence in order to rule on its admissibility. Moreover, Caver has failed to establish how he was prejudiced by the court's actions. Therefore, the trial court properly denied relief based on this claim.

(Doc. 11, Ex. P. at 8-9).

Having reviewed the record in this matter, this Court likewise finds that Petitioner's trial counsel was not deficient for failing to move for a mistrial when the court commented on Johnson's prior statement to the police, nor was his appellate counsel ineffective for failing to raise trial counsel's ineffectiveness on appeal. At trial, Petitioner sought to introduce a prior statement given by Johnson to the police in which Johnson purportedly referred to Petitioner as a "snitch." With this evidence, Petitioner sought to establish Johnson's motive for fabricating the story that Petitioner robbed him. (Id.). Assuming, *arguendo*, that the trial court's remark that Johnson had not called anyone a "snitch" was improper, the record shows that, immediately after making the comment, the court allowed Petitioner to elicit testimony from Johnson that he had told the police that Petitioner "had a reputation for going to jail and telling on everybody." (Doc. 11, Ex. A, Vol. 2 at R-46). Therefore, Petitioner was not prejudiced by the remark, see Strickland, 466 U.S. at 694, and, consequently, neither Petitioner's trial counsel nor his appellate counsel was deficient with respect to habeas claim 10.

With respect to habeas claim 11, Petitioner claims that his trial counsel was ineffective for failing to file a motion

to impeach the victim, Tracy Johnson, pursuant to Alabama Rules of Evidence⁷ 609 and 616 and that his appellate counsel was ineffective for failing to raise trial counsel's ineffectiveness on appeal. Petitioner presented this same argument to the Alabama Court of Criminal Appeals in his Rule 32 proceedings, and, in its memorandum opinion denying Petitioner's request for Rule 32 relief on this claim, the court stated:

Caver contends that his appellate counsel was ineffective for failure to raise a claim of ineffective assistance of trial counsel based on trial counsel's failure to move to impeach the credibility of a certain witness. Specifically, Caver argued that trial counsel should have filed motions pursuant to Rule 609 and 616, Ala. R. Crim. P., to elicit testimony that the victim in this case and Caver's uncle had a vendetta against Caver and his co-defendant for a previous assault. Caver contends that the State coerced favorable testimony from this witness in exchange for leniency in a potential probation revocation, and that trial counsel should have presented this evidence to the jury to prove bias on the part of the witness.

We first note that the trial transcript does not reveal that this particular witness testified at trial. Thus, there was no basis upon which to file such a motion. Trial counsel cannot be held to be ineffective for failing to file a motion for which no legal basis exists.

⁷ Petitioner erroneously refers to these rules as Alabama Rules of Criminal Procedure 609 and 616.

See Patrick v. State, 680 So. 2d 959 (Ala. Crim. App. 1996). Thus, neither counsel was ineffective for failing to take such a course of action.

(Doc. 11, Ex. P. at 10-11).

Having reviewed the record in this matter, this Court likewise finds that Petitioner's trial counsel was not deficient for failing to file a motion to impeach Johnson pursuant to Alabama Rules of Evidence 609 and 616, nor was his appellate counsel deficient for failing to raise trial counsel's ineffectiveness on appeal. The record shows that the Alabama Court of Criminal Appeals rejected Petitioner's argument related to the victim's uncle, because the uncle did not testify. In his habeas petition, however, Petitioner argues that his trial counsel was ineffective for failing to attempt to impeach the victim, Johnson, with evidence of the alleged vendetta and with evidence of leniency by the prosecution concerning Johnson's probation. (Doc. 1, petition at 18). The Court disagrees for two reasons.

First, in order to impeach Johnson with evidence of the alleged vendetta, Petitioner's trial counsel would have been required to disclose to the jury that Petitioner, along with his present co-defendant Morrissette, had assaulted Johnson's uncle. According to Petitioner, both he and Morrissette were arrested and charged with the assault, and Morrissette had

been released from prison on that charge only three months before the alleged robbery. (Doc. 1, attachment at 18). This evidence could have had obvious negative implications for Petitioner, and the decision concerning whether to avoid this subject altogether in front of the jury was one that properly rested with Petitioner's trial counsel. "[A] court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the defendant must overcome the presumption that, under the circumstances, the challenged action 'might be considered sound trial strategy.'" Strickland, 466 U.S. at 689. Petitioner has failed to overcome this presumption.

Second, despite Petitioner's argument in his habeas petition that his trial counsel should have impeached Johnson with evidence that Johnson received leniency on his probation in exchange for his testimony, there is no evidence whatsoever that such an agreement existed. Therefore, Petitioner's trial counsel was not deficient for failing to attempt to impeach Johnson on that basis, nor was appellate counsel deficient for failing to raise trial counsel's ineffectiveness on appeal.

With respect to habeas claim 12, Petitioner claims that his trial counsel was ineffective for failing to file a motion to admit evidence of other crimes by the victim, Johnson,

under Alabama Rule of Evidence 404(b) and that his appellate counsel was ineffective for failing to raise trial counsel's ineffectiveness on appeal. Although Petitioner presented this argument to the Alabama Court of Criminal Appeals in his Rule 32 proceedings, that court neither addressed nor adjudicated it. (Doc. 11, Ex. P). Therefore, the Court is unconstrained by § 2254(d) and will proceed to review this claim *de novo*.

In his habeas petition, Petitioner argues that his trial counsel was ineffective for failing to file a motion under Rule 404(b) to admit evidence that the victim, Johnson, had previously been charged with the crime of discharging a firearm into an occupied vehicle. Petitioner argues that this evidence would have shown that Johnson had a motive to fabricate the story about the robbery; *i.e.*, fear that he would be charged, a second time, with discharging a firearm into a vehicle and would be sent to prison. (Doc. 1, attachment at 19).

Alabama Rule of Evidence 404(b) provides:

Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident, provided that upon request by the accused, the

prosecution in a criminal case shall provide reasonable notice in advance of trial, or during trial if the court excuses pretrial notice on good cause shown, of the general nature of any such evidence it intends to introduce at trial.

The record shows that Johnson testified at trial that, after being robbed at gunpoint by Petitioner and Morrissette, he immediately called the police, and an officer came to his home and took a report. A short time later, Johnson encountered Petitioner and Morrissette again. This time, Johnson was walking through an alley near his home and saw Petitioner, Morrissette, and two other individuals in a vehicle. Johnson and Petitioner exchanged gunfire, but no one was injured. Johnson retreated to this home. (Doc. 11, Ex. A, Vol. 2 at R-32-R-36). At the same time, the police department received a telephone call reporting gunfire from a vehicle matching the description of the vehicle in which Petitioner, Morrissette, and the other two individuals were riding. (Id. at R-52). The police arrested them within minutes of the call. (Id. at R-52-R-54).

Because it is undisputed that Johnson had already reported the robbery to the police before the exchange of gunfire ever took place, the shooting could not have been the motive for the robbery report. For this reason, Petitioner's trial counsel was not deficient for failing to file a motion

under Rule 404(b) to admit evidence of "other crimes" by Johnson in order to show Johnson's motive for reporting the robbery, nor was Petitioner's appellate counsel deficient for failing to raise trial counsel's ineffectiveness on appeal.

With respect to habeas claim 13, Petitioner claims that his trial counsel was ineffective for failing to file a motion for additional jurors from which to strike the jury and that his appellate counsel was ineffective for failing to raise trial counsel's ineffectiveness on appeal. Petitioner presented this same argument to the Alabama Court of Criminal Appeals in his Rule 32 proceedings, and, in its memorandum opinion denying Petitioner's request for Rule 32 relief on this claim, the court stated:

Caver argues that his appellate counsel was ineffective for failing to raise a claim of ineffective assistance of trial counsel based on trial counsel's failure to move the court for additional jurors from which to strike a jury. Caver and his co-defendant, Kenneth Morrissette, were tried jointly. As best we are able to determine, Caver contends that, because certain members of the jury pool were already selected for other cases, there was an insufficient number of jurors in the venire from which their jury was chosen.

Section 12-16-100(1), Ala. Code 1975, requires that there must be a minimum of 24 jurors from which to strike a petit jury in a felony case. Our review of the record of Caver's direct appeal reveals that there were 28 jurors in the venire from which

Caver and Morissette's jury was selected. Accordingly, the circuit court correctly determined that Caver had failed to state a claim upon which relief could be granted. Therefore, counsel was not ineffective for failing to argue such a claim.

(Doc. 11, Ex. P at 10).

Having reviewed the record in this matter, this Court likewise finds that Petitioner's trial counsel was not deficient for failing to file a motion for additional jurors from which to strike the jury, nor was his appellate counsel deficient for failing to raise trial counsel's ineffectiveness on appeal. The record shows that the twelve-person jury in Petitioner's case was chosen from a venire of twenty-eight prospective jurors. (Doc. 11, Ex. 2, Vol. 2 at CR. 3, 28). Alabama Rule of Criminal Procedure 18.4(f)(1)(ii) provides that, in a non-capital felony case, a jury shall be selected from a list of twenty-four prospective jurors, unless the parties consent to the use of a lesser number. Rule 18.4(f)(2) further provides that an additional twelve names shall be provided for each additional defendant, if two or more persons are being tried jointly. Thus, Petitioner argues, his jury should have been selected from thirty-six potential jurors, and his trial counsel was ineffective for agreeing to less. The Court disagrees.

In matters of jury selection, one can easily conceive of

legitimate, strategic reasons that a trial attorney might agree to accept the jury venire seated before him, even if less than the number to which his client is legally entitled, rather than risk the addition of less favorable jurors into the pool. As discussed above, "[a] court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the defendant must overcome the presumption that, under the circumstances, the challenged action 'might be considered sound trial strategy.'" Strickland, 466 U.S. at 689. Petitioner has failed to overcome this presumption.

Moreover, Petitioner has failed to show that he was prejudiced by his trial counsel's decision to strike a jury from a venire of twenty-eight prospective jurors instead of thirty-six. "In order to satisfy Strickland's prejudice prong, '[a] defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.'" Strickland, 466 U.S. at 694. This Petitioner has also failed to do. See Cabberiza v. Moore, 217 F.3d 1329, 1334 (11th Cir. 2000) ("[t]he record in this case is devoid of evidence that 'show[s] there is a reasonable probability' that an acquittal or hung jury would have resulted had Petitioner's counsel

insisted on twelve jurors [instead of consenting to six] ."). Therefore, Petitioner has failed to show that his trial counsel was ineffective for failing to file a motion for additional jurors from which to strike the jury or that his appellate counsel was ineffective for failing to raise trial counsel's ineffectiveness on appeal.

With respect to habeas claim 14, Petitioner claims that his trial counsel was ineffective for failing to request additional jury charges on witness credibility and that his appellate counsel was ineffective for failing to raise trial counsel's ineffectiveness on appeal. (Doc. 1, attachment at 22). Petitioner presented this same argument to the Alabama Court of Criminal Appeals in his Rule 32 proceedings, and, in its memorandum opinion denying Petitioner's request for Rule 32 relief on this claim, the court stated:

Caver contends that appellate counsel was ineffective for failing to raise a claim of ineffective assistance of trial counsel based on trial counsel's failure to request certain jury charges. Specifically, he argues that trial counsel should have requested instructions on the effect of 'bad character evidence of a witness' and 'of charges stating that if the conviction depends on testimony of a single witness and the jury has reasonable doubt as to the truthfulness of the testimony of

such witness, they cannot convict the defendant." The trial court, in its order dismissing Caver's claims, ruled that the court's charge was appropriate and that Caver failed to show that he suffered any substantial prejudice.

We agree with the circuit court's finding. A trial court has broad discretion in formulating its jury instructions, provided those instructions are accurate reflections of the law and facts of the case. Knotts v. State, 686 So. 2d 431, 456 (Ala. Crim. App. 1995), aff'd, 686 So. 2d 486 (Ala. 1996). Moreover, a trial court's oral charge to the jury cannot be viewed in bits and pieces, but must be viewed in its entirety. Jones v. State, 644 So. 2d 1336, 1338 (Ala. Crim. App. 1994). Even if counsel had requested jury instructions on these issues, there is no guarantee that the circuit court would have given the proposed instructions. "The refusal of a requested written instruction, although a correct statement of the law, shall not be cause for reversal on appeal if it appears that the same rule of law was substantially and fairly given to the jury in the court's oral charge. . . ." Rule 21.1, Ala. R. Crim. P. Accordingly, the circuit court correctly concluded that Caver was not prejudiced by either trial or appellate counsel's performance in this regard.

(Doc. 11, Ex. P at 11-12).

Having reviewed the record in this matter, this Court likewise finds that Petitioner's trial counsel was not deficient for failing to request additional jury charges on witness credibility, nor was his appellate counsel deficient for failing to raise trial counsel's ineffectiveness on appeal. The record shows that the trial court charged the jury that it should consider only the witness testimony that it found "worthy of belief." (Doc. 11, Ex. A, Vol. 2 at R-123). The court further instructed the jury that it should consider any interest that a witness might have in the outcome of the case, any bias the witness may have shown, and the witness' demeanor on the stand. (Id.). The court also instructed the jury that it could disregard, *in toto*, the testimony of any witness believed to have willfully testified falsely. (Id. at R-124). If Petitioner's trial counsel chose not to request further jury instructions on witness credibility, such as Petitioner's suggestion that the jury should disregard the testimony of any person whom they believed to be of bad character, he may have done so out of concern for his own client's testimony. The Court will not second-guess that decision. See Strickland, 466 U.S. at 689 ("defendant must overcome the presumption that, under the

circumstances, the challenged action 'might be considered sound trial strategy.'"). Because the trial court adequately instructed the jury on how to evaluate the veracity of a witness's testimony, Petitioner was not entitled to further instructions on that issue. Thus, the Court finds that Petitioner has failed to establish that either trial counsel or appellate counsel was deficient with regard to habeas claim 14.

With respect to habeas claim 15, Petitioner claims that his trial counsel was ineffective for failing to conduct a proper investigation and that his appellate counsel was ineffective for failing to raise trial counsel's ineffectiveness on appeal. Petitioner presented this same argument to the Alabama Court of Criminal Appeals in his Rule 32 proceedings, and, in its memorandum opinion denying Petitioner's request for Rule 32 relief on this claim, the court stated:

Caver next contends that his appellate counsel was ineffective for failing to raise on appeal that his trial counsel was ineffective for breaching his duty to investigate. Specifically, Caver contends that his trial counsel failed to conduct a door-to-door investigation, did not diligently interview residents, and failed to properly consider the alleged eye-witness, Jesse "Longhead" Dixon, as a defense witness at trial. Caver contends that Dixon would have testified favorably

in his defense and that his counsel was deficient for not utilizing his testimony.

The circuit court, in its order denying this claim, concluded that Caver's allegations failed to plead with specificity his contentions; the trial court also concluded that Caver's claim regarding Dixon was wholly without merit, as Dixon had removed himself from the scene before the events occurred by locking himself out of the house. Therefore, the court concluded, Dixon could not have been an eyewitness to the occurrence. Even in the absence of Dixon's testimony, the court found that Dixon's potential testimony would have been cumulative of the testimony of three other defense witnesses. Because Caver cannot establish that the outcome of his trial would have been different or that counsel's decision was not outside the scope of competent professional conduct, based on testimony that would have been, at best, cumulative, we affirm the circuit court's holding that this claim was without merit. "This Court will not second-guess tactical decisions of counsel in deciding whether to call certain witnesses." Luke v. State, 484 So. 2d 531, 534 (Ala. Crim. App. 1985) (quoting United States v. Long, 674 F.2d 848, 855 (11th Cir. 1982) (as quoted in Falkner v. State, 462 So. 2d 1040, 1042 (Ala. Crim. App. 1984)).

(Doc. 11, Ex. P at 5-6).

Having reviewed the record in this matter, this Court likewise finds that Petitioner's trial counsel was not deficient for failing to conduct a proper investigation, nor was his appellate counsel deficient for failing to raise trial counsel's ineffectiveness on appeal. Petitioner claims that,

on the day before the trial began, a witness, Jesse Dixon, told Petitioner's attorney that the robbery never took place. However, Dixon was unable to make it to court the next day. Petitioner claims that his trial counsel was deficient for failing to request a continuance on that basis. (Doc. 1, attachment at 23). The Court disagrees. The record shows that the victim, Tracy Johnson, testified that he was alone with Petitioner and Morissette at the time that he was robbed. Johnson testified that Dixon had been outside with him that day but had run into the house and locked the door as soon as Petitioner and Morissette drove up. (Doc. 11, Ex. A, Vol. 2 at R-26-R-30). Therefore, assuming that Petitioner's trial counsel had requested, and been given, a continuance so that he could make arrangements for Dixon to testify, Petitioner has not shown that, with Dixon's testimony, "there is a reasonable probability that. . . the result of the proceeding would have been different." Strickland, 466 U.S. at 694.

In addition, Petitioner claims that his trial counsel was deficient for failing to obtain additional documents from the police department showing an alleged discrepancy in the time of his arrest. (Doc. 1, attachment at 24). Petitioner claims that he was arrested at 5:47 p.m. (Doc. 1, attachment at 23),

not at approximately 7:00 p.m., as Officer Bolton testified (Doc. 11, Ex. A, Vol. 2 at R-50-R-52). Assuming, *arguendo*, that Officer Bolton's testimony concerning the time of arrest was incorrect, Petitioner has failed to show that the purported discrepancy has any significance whatsoever to his defense to the robbery charge. The evidence is undisputed that Petitioner was arrested immediately following a gunfight with Tracy Johnson, which occurred the same day, but after, Johnson filed a police report stating that he had been robbed by Petitioner. (Doc. 11, Ex. A, Vol. 2 at R-50-R-56). Even if Petitioner's trial counsel had obtained additional documents showing a discrepancy in the time of Petitioner's arrest, Petitioner has failed to show any possible difference that it would have made in the result of the proceeding. See Strickland, 466 U.S. at 694. Therefore, Petitioner's trial counsel was not deficient for failing to obtain additional documentation related to the time of Petitioner's arrest, and Petitioner's appellate counsel was not deficient for failing to raise trial counsel's ineffectiveness on appeal.

Petitioner's two final claims do not involve ineffective assistance of counsel. In habeas claim 16, Petitioner claims that the trial court was without jurisdiction to render judgment or impose sentence in his case. Petitioner presented

this same argument to the Alabama Court of Criminal Appeals in his Rule 32 proceedings, and, in its memorandum opinion denying Petitioner's request for Rule 32 relief on this claim, the court stated:

Caver argues in part XVIII of his brief that he was denied the right to be present at his sentencing hearing, in violation of Rule 26.7, Ala. R. Crim. P. The record before us and the archived records of this Court reflect that Caver's direct appeal was remanded by this Court so that the judgment entry on the case action summary sheet could be reconciled with the sentence pronounced in open court. Contrary to Caver's assertion, the court's action did not constitute a resentencing of Caver. Thus, Rule 26.7 had no relevance to the circuit court's actions. Caver did not have a right to be present when the court entered a corrected judgment entry reflecting the sentence imposed in open court. Accordingly, the circuit court correctly determined that Caver had failed to state a claim upon which relief could be granted.

(Doc. 11, Ex. P at 12).

Having reviewed the record in this matter, this Court likewise finds Petitioner's claim to be without merit. The record shows that, following Petitioner's conviction, the trial court sentenced him in open court to a term of "life" in the State penitentiary. (Id., Ex. A, Vol. 3 at R-32). However, the case action summary erroneously reflected that Petitioner had been sentenced to a term of "life without

parole." (Id., Vol. 1 at C.R. 4). Following Petitioner's direct appeal, the Alabama Court of Criminal Appeals remanded the case to the circuit court with instructions to "reconcile its case action summary with the sentence pronounced in open court." ("Remandment" volume at C.R. 1). The trial court did so, correcting the case action summary to indicate, "Sentencing order of 9-16-99 is hereby corrected as follows: Defendant is sentenced to the penitentiary for the term of Life. All other aspects of sentence to remain the same." ("Remandment" volume at C.R. 5). Because the trial court did not re-sentence Petitioner but, rather, merely corrected an erroneous entry on the case action summary sheet, Petitioner's argument that he was entitled to be present when he was "re-sentenced" is without merit.

With respect to habeas claim 17, Petitioner claims that his due process rights were violated by the court's failure to conduct a sentencing hearing. Petitioner presented this same argument to the Alabama Court of Criminal Appeals in his Rule 32 proceedings, and, in its memorandum opinion denying Petitioner's request for Rule 32 relief on this claim, the court stated:

Caver argues in part XIX of his opinion that his due process rights were violated by the circuit court's failure to conduct a proper sentencing hearing.

Specifically, Caver argues that the circuit court neglected to conduct an allocution. The court determined that this claim was without merit, recalling that the sentencing hearing included an allocution. Our review of the record of Caver's direct appeal likewise reveals that an allocution occurred. Contrary to Caver's claims, an allocution need not include any specific words. See Jones v State, 555 So. 2d 333, 336 (Ala. Crim. App. 1989) (no "magic words" necessary to show that an alloc[u]tion occurred). Rather, the court must simply afford the defendant an opportunity to speak before sentence is imposed. Because Caver was given this opportunity, no basis for relief exists as to this claim.

(Doc. 11, Ex. P at 12-13).

Having reviewed the record in this matter, this Court likewise finds that Petitioner's claim that he was denied an opportunity to speak at his sentencing hearing is without merit. The record shows that, prior to pronouncing Petitioner's sentence, the court asked him, "Mr. Caver, do you have anything you wish to say," to which he replied, "No, sir." (Id., Ex. A, Vol. 3 at R-32). Accordingly, Petitioner's argument with respect to habeas claim 17 is unavailing.

In sum, with respect to Petitioner's habeas claims 2-11 and 13-17, which were considered by the Alabama Court of Criminal Appeals and denied on the merits, the Court finds that Petitioner has failed to establish under the "contrary

to" clause of § 2254(d)(1) that the Alabama Court of Criminal Appeals applied a rule that contradicts the governing law as set forth in Supreme Court case law or that the court decided the case differently than the Supreme Court did in a previous case presenting a set of materially indistinguishable facts. Likewise, Petitioner has failed to establish under the "unreasonable application" clause that the state court, though recognizing the correct governing principles from the Supreme Court's decisions, unreasonably applied those principles to the facts in this case. Thus, Petitioner has not established that he is entitled to relief under § 2254(d)(1). In addition, Petitioner has failed to establish entitlement to relief under § 2254(d)(2) by showing that the decision of the Alabama Court of Criminal Appeals was based on an unreasonable determination of the facts in light of the evidence presented in the state court proceeding. This Court must presume as correct the determinations of all factual issues made by the state court. 28 U.S.C. § 2254(e). Petitioner has not rebutted that presumption of correctness by clear and convincing evidence.

Also, with respect to habeas claim 12 and the portion of habeas claim 5 related to ineffective assistance of appellate counsel, which the Alabama Court of Criminal Appeals did not

adjudicate, the Court has considered those claims, *de novo*, and has found them to be completely without merit.

Accordingly, as the Court found with habeas claim 1, Petitioner has failed to establish that he is entitled to habeas relief on the basis of habeas claims 2 through 17, and, therefore, those claims are due to be dismissed.

CONCLUSION

Based on the foregoing, the undersigned Magistrate Judge is of the opinion that Petitioner's rights were not violated and that his request for habeas corpus relief should be denied. It is so recommended.

The attached sheet contains important information regarding objections to the report and recommendation of the Magistrate Judge.

DONE this the 22nd day of July, 2005.

/s/SONJA F. BIVINS
UNITED STATES MAGISTRATE JUDGE

**MAGISTRATE JUDGE'S EXPLANATION OF PROCEDURAL RIGHTS
AND RESPONSIBILITIES FOLLOWING RECOMMENDATION
AND FINDINGS CONCERNING NEED FOR TRANSCRIPT**

1. **Objection.** Any party who objects to this recommendation or anything in it must, within ten days of the date of service of this document, file specific written objections with the clerk of court. Failure to do so will bar a *de novo* determination by the district judge of anything in the recommendation and will bar an attack, on appeal, of the factual findings of the magistrate judge. See 28 U.S.C. § 636(b)(1)(C); Lewis v. Smith, 855 F.2d 736, 738 (11th Cir. 1988). The procedure for challenging the findings and recommendations of the magistrate judge is set out in more detail in SD ALA LR 72.4 (June 1, 1997), which provides, in part, that:

A party may object to a recommendation entered by a magistrate judge in a dispositive matter, that is, a matter excepted by 28 U.S.C. § 636(b)(1)(A), by filing a "Statement of Objection to Magistrate Judge's Recommendation" within ten days after being served with a copy of the recommendation, unless a different time is established by order. The statement of objection shall specify those portions of the recommendation to which objection is made and the basis for the objection. The objecting party shall submit to the district judge, at the time of filing the objection, a brief setting forth the party's arguments that the magistrate judge's recommendation should be reviewed *de novo* and a different disposition made. It is insufficient to submit only a copy of the original brief submitted to the magistrate judge, although a copy of the original brief may be submitted or referred to and incorporated into the brief in support of the objection. Failure to submit a brief in support of the objection may be deemed an abandonment of the objection.

A magistrate judge's recommendation cannot be appealed to a Court of Appeals; only the district judge's order or judgment can be appealed.

2. **Opposing party's response to the objection.** Any opposing party may submit a brief opposing the objection within ten (10) days of being served with a copy of the statement of objection. Fed. R. Civ. P. 72; SD ALA LR 72.4(b).

3. Transcript (applicable where proceedings tape recorded). Pursuant to 28 U.S.C. § 1915 and Fed. R. Civ. P. 72(b), the magistrate judge finds that the tapes and original records in this action are adequate for purposes of review. Any party planning to object to this recommendation, but unable to pay the fee for a transcript, is advised that a judicial determination that transcription is necessary is required before the United States will pay the cost of the transcript.

S/ Sonja F. Bivins

UNITED STATES MAGISTRATE JUDGE